IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 3:19-cr-083-M-1
	)	Chief Judge Barbara M. G. Lynn
RUEL M. HAMILTON	)	

MR. HAMILTON'S MOTION TO PRECLUDE UNSWORN, OUT-OF-COURT CO-CONSPIRATOR STATEMENTS PURSUANT TO THE CONFRONTATION CLAUSE AND TO DISMISS FOR A LACK OF EVIDENCE

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INTRODUCTION

The Framers thought "informer" testimony was inherently unreliable, and they enacted a Confrontation Clause to prevent informers from testifying to unsworn statements they are incentivized by the government to claim they had heard. Yet that seems to be the government's plan here with Jeremy Scroggins, a now twice-convicted felon who admits to stealing from a charity that he operated. Despite admitting to this more serious criminal conduct, the government has given Scroggins a break, charging him only with a misprision of a felony, one that plays to the narrative in its Indictment of Mr. Hamilton. All Scroggins has to do in return is testify that Mr. Hamilton was bribing Carolyn Davis. As he had no contact with Mr. Hamilton, Scroggins presumably will claim to have been told this by Davis sometime before she died.

If so, this is precisely the type of testimony foreclosed by the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36 (2004), created a sea change in the construction of the Sixth Amendment, in which its contours are defined originalism rather than modern notions of what evidence is trustworthy. "[T]he Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Giles v. California*, 554 U.S. 353, 358 (2008) (quoting *Crawford*, 541 U.S. at 54). *Giles* carefully examined the pre-Founding Era understanding of the "forfeiture by wrongdoing exception" and struck down a modern understanding of that exception that deviated from the Founding Era's understanding. Thus, *Giles* makes clear "the only exceptions to this re-worked Confrontation Clause standard were those that existed at the time of the founding of our nation." Adam Mansfield, *Giles v. California And Forfeiture By Wrongdoing: Timing Is Everything*, 38 Cap. U. L. Rev. 673, 674 (2010); *see also Melendez-Diaz v. Massachusetts*, 557

U.S 305, 309 (2009) (evaluating "the Clause's historical underpinnings").[1]

Any statement that Scroggins will claim that Davis made is unsworn hearsay and inadmissible, and no hearsay exception – including the co-conspirator hearsay exception – is applicable. (*See* Mot. To Exclude Hearsay.) But any effort by the government to invoke the co-conspirator hearsay exception should be barred, as that hearsay exception did not exist at the time of founding. Such statements were inadmissible then, and the Confrontation Clause bars their admission now. For the government to claim otherwise the government must identify at least a single pre-Founding Era case where the government obtained admission of any unsworn, out-of-court statement by an unavailable declarant under the co-conspirator hearsay exception. This is a challenge the government will fail.

ARGUMENT

I. THE FRAMERS DID NOT TRUST CO-CONSPIRATOR HEARSAY

The Founders feared the unreliability of alleged co-conspirator statements because many of them were considered "conspirators" for opposing British policies pre-Revolution and all were

[1] A majority of the Supreme Court still supports *Crawford*'s originalist approach, but that majority interprets the history differently. *Williams v. Illinois*, 567 U.S. 50 (2012), highlights the disarray. A plurality, joined by Justice Thomas (an originalist who does not accept *Crawford*'s history), rejected a Confrontation Clause challenge, while four ardent *Crawford* supporters dissented. Despite *Williams*' outcome, "[f]ive Justices specifically reject[ed] every aspect of [the plurality's] reasoning and every paragraph of its explication." *Id.* at 120 (Kagan, J., dissenting); *see* George Fisher, *The Crawford Debacle*, 113 Mich. L. Rev. First Impressions 17, 27 (2014) (noting the plurality's "four justices, having largely disavowed *Crawford*, hint at reviving an analysis rooted in contested hearsay's reliability"). "Now, with two new Justices replacing both *Crawford*'s champion [Scalia] and one of its principal skeptics [Kennedy], respectively, confrontation jurisprudence is once again at a crossroads." Michael Pardo, *Confrontation After Scalia And Kennedy*, 70 Ala. L. Rev. 757, 761 (2019) (Gorsuch and Kavanaugh are originalists, with unknown views of confrontation history). Recent historical analysis supports reformulating *Crawford* to exclude more hearsay. *See, e.g.*, K. Graham & D. Blinka, *Crawford: Botts Dots Or Needless Detour?*, 30A Fed. Prac. & Proc. §6371.2 (2019) [hereinafter "*FPP*"] (criticizing *Crawford*'s "false history" and explaining that "bad history understates the opposition of the Founders" to even nontestimonial hearsay).

"conspirators" in treason once the Revolution began. Members of the Constitutional Convention

> had themselves been guilty of treason under any interpretation of British law. They not only had levied war against their King themselves, but they had conducted a lively exchange of aid and comfort with France, then England's ancient enemy. Every step in the great work of their lives from the first mild protests against kingly misrule to the final act of separation had been taken under the threat of treason charges.

Cramer v. United States, 325 U.S. 1, 14 (1945).

In colonial America, "informers were a crucial part of the enforcement machinery for the Navigation Acts." *The Revolutionary Impetus*, *FPP* §6345 (receiving 1/3 of fines and forfeitures); *see* Oliver M. Dickerson, *The Navigation Acts And The American Revolution* 212 (1951); *The Colonial Experience*, *FPP* §6344. Colonial governments would extend pardons to informers, just as the government now offers immunity and leniency through plea bargaining. *See, e.g.*, V *Acts of the Privy Council of England, Colonial Series* 365-67 (1908-12) (offering pardons to informers). Under the civil law system, vice-admiralty courts enforced the Navigation Acts, and testimony from informants typically came through written *ex parte* submissions by witnesses who never were subject to cross-examination.

Informants quickly became one of the most despised categories of persons in the colonies. "Informers figure prominently in Revolutionary propaganda against vice-admiralty courts, particularly after Parliament allowed vice-admiralty judges to immunize them from civil suits arising from their activities." *FPP* §6345. "In the eyes of the colonists, informers were more reprehensible than smugglers" and they were frequently targeted for violence by angry mobs. *Id.* Religious people compared informants to the accuser in the Book of Job or Judas' betrayal of Jesus, and secular sources like Cesare Beccaria's *Of Crimes and Punishments* explained: "Whoever suspect[s] another to be an informer, holds him an enemy . . . ." *Foxe's Book of Martyrs*, *FPP* §§6342.1, 6345. George Mason, drafter of America's first Confrontation Clause for the Virginia Constitution, wrote revolutionary propaganda critical of the vice-

admiralty courts' reliance upon informants, which he explains are "'the most mischievous, wicked, abandoned and profligate race,' says an eminent writer upon British politics, 'that ever God permitted to plague mankind.'" *FPP* §6345.[2] Henry Laurens, later President of the Continental Congress, waged a propaganda war against "the use of pampered informers and the denial of trial by jury." *Id.* §6345. Following the Revolution, it remained the highest insult to be called an informer. For example, the eleventh article of impeachment for Justice Chase was that by disregarding his duties he "did descend from the dignity of a judge, and stoop to the level of an informer." 14 *Annals of Congress* 87 (1804).

A major American trial that captured the public's attention was the highly charged prosecution of John Hancock, represented by John Adams. The British prosecuted Hancock in a vice-admiralty court for smuggling in 1768. Oliver Dickerson, *Boston Under Military Rule, 1768-1769* 102 (1936). The prosecution was based upon a sworn statement from a government informant much like Jeremy Scroggins in the case. The informer there, Thomas Kirk, claimed the ship's captain – an alleged co-conspirator of Hancock's who was then deceased – offered him a bribe to land without paying a duty, locked him below deck when he refused and threatened him not to report what occurred. *Id.* While locked below deck, Kirk claimed he heard wine being unloaded. *Id.* Under vice-admiralty procedure, Adams had no opportunity to cross-examine Kirk and, just as importantly, no opportunity to cross-examine the statement of Hancock's alleged co-conspirator, the ship's captain. *FPP* §6345. Adams complained, insisting that "Every Examination of Witnesses ought to be in open Court, in Presence of the Parties, Face

[2] *The Founders' Vision*, *FPP* §6346 (quoting a Delaware Legislative Council objection to an anti-Loyalist statute because it "will encourage a race of informers, the pest of society, and who always were the engine of tyrants in every State. It is to be hoped that the just cause in which all America is embarked is not to be injured by the speeches of rash, foolish or wicked individuals, or at least they are not to be so much apprehended as the effects of so dangerous a precedent in the infancy of our Government.").

to Face." 2 Wroth & Zobel, *Letters of John Adams* 207 (1965). That complaint figured prominently in the press. *See, e.g.*, Dickerson, *Boston Under Military Rule*, at 28.

Adams and other soon-to-be revolutionaries publicized details of the Hancock trial throughout the colonies. *FPP* §6345. Adams criticized the proceedings as "more alarming than any that had appeared to the world, since the abolition of the Court of the Star Chamber." 3 Wroth & Zobel, *Letters of John Adams* 54 (1965). The Commissioners' reliance upon statements allegedly made to government informants was a common theme of the attack. *FPP* §6345. With respect to the vice-admiralty courts' reliance upon informants, the press wrote:

> Shall we compare them to the infamous times of the Stuart's reign, or the dregs of the roman state, when street conversation (however innocent) was taken up by vagabond pimps, employed and paid for their pains and carried to their superiors, who thence formed the measures of the administration. It is well remembered, that within these few years, such wretches were employed to pick up materials of this sort . . . .

Id. at 65.[3]

The Founders objected to the use of these procedures in England as well. After Henry VIII broke England away from the Catholic Church, a successor, Queen Mary I attempted to restore the Catholic Church in England through repressive means. Many were executed for their religious beliefs in these Marian Persecutions following convictions secured through civil law-styled Marian examinations. *Crawford*, 541 U.S. at 43-44 (citations omitted).

A justice of the peace would write a summary of the witness's testimony to be used as evidence at trial. *Crawford*, 541 U.S. at 44. Witness statements typically would not be made face-to-face with the accused and the defendant would not be afforded a right of cross-

[3] Hancock charges were dismissed, but the vivid accounts of the trial profoundly impacted the revolutionary generation and led to the adoption of the Bill of Rights and Confrontation Clause in particular. *See, e.g.*, *United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 464 (7th Cir. 1980); *Close v. Calmar Steamship Corn.*, 44 F.R.D. 398, 404 n.15 (E.D. Pa. 1968); *FPP* §6345; Neal Nusholtz, *A Brief History Of The Deficit And Tax Reform* 14 Mich. B. J. 679, 686 (1995; *see also Crawford*, 541 U.S. at 48 (quoting Adams at Hancock trial).

examination. Often, statements were drafted by government agents and the witnesses were pressured to sign them. The injustice of using these statements at trial was highlighted through several prominent treason trials, most notably the 1603 trial of Sir Walter Raleigh. *Id*. at 44.

Raleigh was implicated in treason by an alleged co-conspirator, Lord Cobham, who had changed his story many times and who's credibility was shaken. Cobham's Marian examination and an unsworn letter were read to the jury implicating Raleigh, and Raleigh objected that Cobham was not there to testify in person. Raleigh insisted that Cobham made those statements falsely while under duress and that he would recant those statements if called to testify. Despite Raleigh's protests that he was being tried by the procedures of the Spanish Inquisition, he was convicted and sentenced to death. *Id.* at 44. The trial was regarded as a travesty at the time, and the case served as a rallying cry for legal reforms in the years that followed. *Id.* at 44-45. As the Supreme Court recently made clear, Raleigh's case "provoked such an outcry precisely because it flouted the deeply rooted common-law tradition 'of live testimony in court subject to adversarial testing.'" *Melendez-Diaz*, 557 U.S. at 315 (quoting *Crawford*, 541 U.S. at 43).[4]

Cases like Raleigh's and Hancock's involve the very sort of evidentiary uses the government may seek to introduce in this case – the introduction of unsworn, out-of-court statements by alleged co-conspirators against the accused. History makes clear the Founders found the use of such evidence unacceptable.

II. CO-CONSPIRATOR STATEMENTS INCULPATING A DEFENDANT WERE INADMISSIBLE AT THE FOUNDING

Because the Confrontation Clause was modeled after the confrontation clauses in various

[4] *Crawford* focused on Cobham's testimony in Raleigh's trial to show a concern with what *Crawford* characterized as testimonial hearsay. But much of the contemporaneous criticism of Raleigh's trial involved the admission of unsworn hearsay testimony from Dyer about hearing from an unnamed person of Raleigh's treasonous plot. That testimony was likewise condemned, but is in no sense testimonial, which undermines the testimonial/non-testimonial distinction *Crawford* sought to draw from Raleigh's case. Fisher, *supra*, at 21.

state declarations of right adopted between 1776 and 1784,[5] our understanding of the Clause rests upon the Framers' understanding of that right as it then existed in 1789. Davies, 71 Brook. L. Rev. at 154. During that time frame, there was no exception to the common law right of confrontation or the developing law of evidence to admit a co-conspirator's statement.

A. Prior To The Founding, The Exclusion Of Hearsay Was Far More Rigorously Enforced Than Under Modern Hearsay Law

Founding Era hearsay law was far broader than it is today. '"[H]earsay' was defined to include all unsworn out-of-court statements made by anyone other than the defendant." Thomas Davies, *Not "The Framers' Design": How the Framing Era Ban Against Hearsay Evidence Refutes The Crawford-Davis "Testimonial" Formulation Of The Scope Of The Original Confrontation Clause*, 15 J. L. & Pol'y 349, 392 (2007). "Unlike modern doctrine, the framing-era definition of 'hearsay' was not limited to out-of-court statements that were offered to prove the truth of what was said; that refinement does not appear in the framing-era authorities. Rather, the framing-era authorities simply indicated that unsworn statements were banned as evidence of a criminal defendant's guilt." *Id.* at 392.[6] The only exception was for dying declarations, where the solemnity of imminently facing judgment from God was thought tantamount to an oath. *Id.* at 391. Even when hearsay was allowed, it would only be to provide background information, "but such evidence will not be received on any particular facts." 3 William Blackstone, *Commentaries On The Laws of England* 367 (1768).

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[5] The Framers avoided reliance upon post-Independence authority from Britain. Thomas Y. Davies, *What Did The Framers Know, And When Did They Know It? Fictional Originalism In Crawford v. Washington.* 71 Brook. L. Rev. 105, 154 & n.156 (2005). The New York Constitution, for example, prohibited reliance upon British decisions after the Battle of Lexington on April 19, 1775. N.Y. Const., art. XXXV (1777).

[6] For this reason, Mr. Hamilton objects to any effort by the government to circumvent the Confrontation Clause if it seeks to introduce hearsay under the guise that it is not for the purpose of asserting the truth.

The prohibition against hearsay was more aggressively enforced in criminal cases, where a common law right of confrontation was implicated. Hearsay exceptions applicable in civil cases did not apply in criminal cases. *See, e.g.*, 2 Geoffrey Gilbert, *The Law of Evidence* 890 (Capel Lofft ed. 1791) ("But these and other Exceptions, which have their place in civil Cases, do not apply in criminal Cases; and therefore in these the Attestation of the Witness must be to what he knows, and not to that which he has heard; for a mere hearsay is no Evidence . . . ."); Davies, 15 J. L. & Pol'y at 361 n.33 ("civil hearsay exceptions had no bearing on the confrontation right"). In criminal cases, defendants were protected by the law of hearsay, a "settled rule" of confrontation that "no evidence is to be given against a prisoner but in his presence," and a requirement that "evidence for the king must be upon oath."[7] This remained true after the Constitution was ratified.[8] Following the Constitution's ratification, Chief Justice Marshall emphasized: "[C]ourts will always apply the rules of evidence to criminal prosecutions

[7] 2 William Hawkins, *Pleas of The Crown* 428, 434 (1721 ed. and 1771 ed.); 2 William Hawkins, *Pleas of The Crown* 602, 612 (Thomas Leach ed. 1787) [hereinafter "Leach's Hawkins"]; 4 *id.* at 418 (1795 ed.); *see* Chief Baron Geoffrey Gilbert, *The Law of Evidence* 107-08 (1754 ed.); *id.* at 149-50 (1777 ed.); *id.* at 149-50 (1788 ed.) (Even though a witness testifying as to what another said would be under oath, the admission of that hearsay is precluded because "the Person who spake it was not upon Oath; and if a Man had been in Court and said the Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without an Oath, an Oath that there was such a speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . . ").

[8] *See, e.g.*, Leonard MacNally, *The Rule of Evidence on Pleas of the Crown* 360 (1802) ("No evidence can be received against a prisoner but in his presence: and therefore it is agreed that what a stranger has been heard to say, is in strictness no manner of evidence, either for or against the prisoner. The reasons assigned as the grounds of this rale are, because such evidence is not upon oath: and also because the party, who would be affected by such evidence, had no opportunity of cross-examination."); 1 Joseph Chitty, *A Practical Treatise on Criminal Law* 568-69 (1819) (excluding hearsay "[f]or the law admits of no evidence but such as is delivered upon oath, and the original expressions were not only uttered when the speaker not under that obligation, but are liable to be forgotten, misunderstood, and unconsciously altered, by the party who repeats them"); Thomas Peake, *A Compendium of the Law of Evidence* 7-8 (1801) ("The Law . . . always requires the sanction of an oath . . . .").

so as to treat the defence with as much liberality and tenderness as the case will admit." *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807).

B. *Ex Parte* Co-Conspirator Statements Were Excluded As Evidence Against The Accused Prior To The Founding

Raleigh's 1603 conviction on the basis of an out-of-court statement by an alleged co-conspirator led to a reformation of the law to make clear that while a confession of a co-conspirator can be used against the confessor, it cannot be admitted against any other alleged co-conspirator. *See, e.g.*, *Tong's Case*, 84 Eng. Rep. 1061, 1062 (K.B. 1662) (holding a confession is "only evidence against the party himself who made the confession, but cannot be made use of as evidence against any others whom on his examination he confessed to be in the treason"). The Supreme Court took note of this reform in *Crawford* citing *Tong's Case* and the Hawkins and Gilbert treatises. *Crawford*, 541 U.S. at 45 ("Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated."); *see Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring) (*Tong's Case* is "universally accepted.") *Tong's Case*, coupled with the requirement that all statements be under oath, excluded all out-of-court statements by co-conspirators that would inculpate a defendant. Sworn statements (e.g., signed confessions) would be excluded by *Tong's Case* and more casual co-conspirator statements would be excluded because they were not made under oath. For such evidence to be admitted, the co-conspirator would actually have to testify at trial.

C. Prior To The Founding, The Co-Conspirator Exception To The Hearsay Rule Was Far More Limited Than It Is Today

Prior to the Founding, there was a debatable "limited-purpose exception [that] allowed the use of hearsay statements to prove background facts that did not go to the defendant's personal guilt; specifically, this exception permitted hearsay evidence to be used to prove the general existence of a conspiracy, but not the defendant's actual participation in it." Davies, 15

J. J. & Pol'y at 393. "Thus, this exception was not equivalent to the modern co-conspirator statement hearsay exception." *Id.*; *see also* Davies, 71 Brook. L. Rev. at 197 n.299 ("[T]he historical basis for the 'co-conspirator exception' referred to is dubious.").[9]

> As to . . . How far Hearsay is Evidence: It seems agreed That what a Stranger [an out-of-court declarant] has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other side had no Opportunity of a cross Examination; and therefore is seems a settled Rule, That it shall never be made use of but only by way of Inducement or Illustration of what is properly Evidence . . . .

2 Hawkins, *supra*, at 431 (1721 ed. & 1771 ed.); 2 Leach's Hawkins at 606-07 (1787 ed.). The reference to "inducement and illustration," although opaque today, was common at that time to address general background facts that did not implicate the defendant.[10] Hawkins listed five seventeenth-century treason trials in the margin to illustrate the proposition where witnesses were allowed "to repeat hearsay statements that showed the general existence of a conspiracy against the government, but indicated that such statements were not to be treated as evidence of the defendant's own guilt." Davies, 15 J. 1 & Pol'y at 402 n.126. Other legal sources that did

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[9] Aside from dying declarations, there was no support for any of the modern hearsay exceptions at the time of founding. Davies, 71 Brook. L. Rev. at 119 ("[D]uring the framing era it was still black-letter law that hearsay was 'no evidence.' The modern conception of hearsay and the variety of exceptions under which hearsay is now admitted as evidence in criminal trials were at most only embryonic at the time of the framing" and the Framers "never imagined that informal hearsay could become admissible evidence."); Robert Mosteller, *Remaking Confrontation Clause And Hearsay Doctrine Under The Challenge Of Child Sexual Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691, 745-46 (1993)) ("The historical record is clear . . . that hearsay exceptions were not considered a substitute for cross examination at the time of the promulgation of the Confrontation Clause. Courts recognized only a handful of exceptions.... If we were to take our cue from the exceptions in effect at the time of the framing, the result would be a very restrictive one regarding the admission of hearsay in criminal cases.").

[10] *See, e.g.*, 2 Mathew Bacon, *The New Abridgement of the Law* 313 (1st ed. 1736 & 6th ed. 1793) ("It seems agreed, that what another has been heard to say is no Evidence, because the Party was not under Oath; also, because the Party who is affected thereby, had not an Opportunity of Cross-examining; but such Speeches or Discourses may be made use of by Way of Inducement or Illustration of what is properly Evidence."); William Nelson, *The Law of Evidence* 181 (1744) (same).

acknowledge this rule also emphasized that such evidence could only be used to prove the general background fact that a conspiracy had existed, but could not be used as evidence inculpatory of the defendant. *See, e.g.*, 2 Geoffrey Gilbert, *The Law of Evidence* 891 (Capel Lofft ed. 1791).

But it is far from clear that even this co-conspirator exception, which is much more limited than Rule 801(d)(2)(E), existed in the colonies. Many treatises failed to identify the existence of this exception. *See, e.g.*, Chief Baron Geoffrey Gilbert, *The Law of Evidence* 107-08 (1754 ed.); *id.* at 149-50 (1777 ed.); *id.* at 149-50 (1788 ed.); Francis Buller, *An Introduction to the Law Relative to Trials at the Nisi Prius* 289-90 (1772 ed.); Henry Bathurst, *Theory of Evidence* 111 (1761); Davies, 15 J. L. & Pol'y at 411 ("Like Gilbert's treatise, the Bathurst and Buller treatises did not mention the existence-of-a-conspiracy exception that Hawkins and Nelson had discussed."). The leading justice of the peace manual, Richard Burn's *Justice of the Peace and Parrish Officer* (1755) failed to note the exception. Davies, 15 J. L. & Pol'y at 415-16 ("[L]ike the treatises by Gilbert, Bathurst, and Buller, Burn omitted the limited-purpose exception that allowed hearsay to be admitted to prove the existence of a conspiracy.").

The exclusion of any discussion of the co-conspirator exception in Burns' work is significant for understanding how the Framers would have viewed the issue on this side of the Atlantic. Given the difficulty of case law-based legal research at the time, Colonial lawyers heavily relied upon the seven major justice of the peace manuals that existed pre-Founding. Each of those manuals followed Burns' approach and omitted any discussion of the co-conspirator exception whatsoever. Davies, 15 J. L. & Pol'y at 416 n.160. "Thus, directly or indirectly, Burn's summary of criminal evidence was probably the most widely available source on the subject in framing-era America." *Id.* at 417.

No American opinion appears to have addressed the viability of this potential exception prior to the Founding – a fact which itself casts doubt on the existence of such an exception – but the narrow nature of any possible exception was made clear by Chief Justice Marshall two decades later in the trial of Aaron Burr when he *rejected* the co-conspirator hearsay exception.

There, Marshall noted, "it is said by some, the declarations of all the conspirators, may be given in evidence on the trial of any one of them, for the purpose of proving the conspiracy" and it was argued that the exception applied in that case. *Burr*, 25 F. Cas. at 195. But Marshall emphasized that, even under that view, the evidence could not be used to inculpate a defendant: "I believe there is no case where the words of an agent can be evidence against his principal on a criminal prosecution." *Id.* at 195. Marshall could not accept that "mere verbal declarations made in [the defendant's] absence, may be evidence against him." *Id.* at 193. And he grounded his decision to exclude the out-of-court inculpatory co-conspirator statements in confrontation terms: "a man should have a constitutional claim to be confronted with the witnesses against him." *Id.*; *see also id.* at 198 ("It is then the opinion of the court, that the declarations of third persons ... not made in the presence of the accused, cannot be received in evidence in this case."). Marshall emphasized the importance of not allowing the hearsay rule to be hollowed out by broadening its exceptions: "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *Id.*; *see, e.g.*, Fisher, *supra*, at 21 (*Burr* "excluded a claimed coconspirator's statement, hearsay *Crawford* deemed nontestimonial"); Jefferey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. Rev. 1865, 1888 (2012) (*Burr* "deemed out-of-court statements of an alleged coconspirator inadmissible because the testimony was unconfronted,

even though those statements appear to fall neatly into the nontestimonial category").

Writing for the Supreme Court, Chief Justice Marshall later reiterated the rule excluding hearsay: "Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296 (1813) (Marshall, C.J.). The early Supreme Court explained that it was "not inclined to extend the exceptions further than they have already been carried." *Id.* at 297. As the Court then explained:

> [I]t may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish Courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rale: the value of which is felt and acknowledged by all.

Id.

Those who seek to trace the co-conspirator exception back to its origins typically point to the Supreme Court's decision – nearly fifty years after the Bill of Rights was drafted and twenty years after *Burr* – in *United States v. Gooding*, 25 U.S. 460 (1827). *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (identifying *Gooding* as the earliest decision).[11] The Supreme Court's initial recognition of an exception in *Gooding*, however, not only comes too late to inform the Framer's intent in drafting the Confrontation Clause, but its construction of the exception is far narrower than would allow the alleged co-conspirator statements in this case to

[11] The exception is sometimes traced back to *Patton v. Freeman*, 1 N.L.J. 113 (1791). As with *Gooding*, that case follows the ratification of the Constitution and could not have informed the Framers' understanding of it. More importantly, *Patton* is irrelevant to interpreting the Confrontation Clause, which operates only in criminal cases, because *Patton* was a civil case. Davies, 15 J. L. & Pol'y at 361 n.33 ("The case simply did not address admissible criminal evidence."). Even in the civil context, it is unclear what the case means for the existence of a co-conspirator hearsay exception because, although the statement was admitted, there does not appear to have been any hearsay objection made. *Id.* at 2 (addressing the issue as one of relevance, whether a statement made by one conspirator to another could be used to prove that a third conspirator, who had stepped out of the room when the statement was made, was admissible to show the intent of all conspirators).

be introduced. *Gooding* involved a clear master-servant agency relationship, not a conspiracy, and there is no suggestion that Mr. Hamilton authorized any alleged co-conspirator to speak on his behalf. *See, e.g.*, Lawrence Kessler, *The Treatment Of Preliminary Issues Of fact In Conspiracy Litigations: Putting The Conspiracy Back Into The Coconspirator Rule*, 5 Hofstra L. Rev. 77 (1976) (emphasizing *Gooding* was merely an agency case). Moreover, *Gooding* only addressed the issue of admissibility in the context of the law of evidence, without any mention whatsoever of the common law right of confrontation or the Confrontation Clause.

Gooding was prosecuted, as a ship owner, for unlawfully engaging in the slave trade based on declarations made by the ship's captain offering to employ a mate to capture slaves. 25 U.S. at 468-69. Following agency principles, the Supreme Court explained what "the agent says within the scope of his authority, the principal says, and evidence may be given to such acts and declarations as if they had been actually done and made by the principal himself." *Id.* at 470. The sole support of that proposition comes from a treatise that only addresses the law of agency – with no mention of conspiracy. *Id.* (citing Thomas Starkie, *The Law Of Evidence* 60 (1824))

It is one thing for the Court to hold a principal accountable for the acts he compels of his actual and formal agents, but it is far from clear that the *Gooding* Court would have extended the exception to reach more modern, expansive notions of an inchoate "conspiracy." The substantive law of conspiracy has greatly expanded since *Gooding*, and this "[e]xpansion in the substantive law of conspiracy has been paralleled by relaxation of the hearsay rule." Joseph Levie, *A Reexamination Of the Co-Conspirators' Exception To The Hearsay Rule*, 52 Mich. L. Rev. 1159, 1162 (1954). Following *Gooding*, courts seldom addressed the co-conspirator exception because, until the substantive crime of conspiracy was expanded in the late nineteenth century, "the crime of conspiracy was rarely invoked by prosecutors." *Id.* at 1163. While the

rational of *Gooding* is logical in a classic agency relationship "the elastic concepts of 'agency' embodied in current conspiracy law have eroded the original agency rationale." John Bilyeu Oakley, *From Hearsay To Eternity: Pendency And the Co-Conspirator Exception In California - Fact, Fiction And A Novel Approach*, 16 Santa Clara L. Rev. 1, 14-15 (1975). The extension of the exception from an agency context to conspiracy appears to "have been created by accident" and "the agency theory may never have been intended to support a hearsay use of coconspirator statements." Christopher Mueller, *The Federal Coconspirator Exception: Action, Assertion, And Hearsay*, 12 Hofstra L. Rev. 323, 324 (1984).

It is worth adding that the modern co-conspirator exception itself is a foolish rule that was "created by accident" and, in "terms of theory, it is an embarrassment." Mueller, *supra*, at 324. The admissibility of co-conspirator statements is not justified because such statements are reliable, but only based upon the legal fiction that all conspirators are the agents of the other. The notion that coconspirators are agents for each other "is little more than a legal fiction" and a dangerous fiction at that. Douglas Borisky, *Reconciling The Conflict Between The Coconspirator Exemption From The Hearsay Rule And the Confrontation Clause Of The Sixth Amendment*, 85 Colum. L. Rev. 1294, 1308 (1985). "The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law." Levie, *supra*, at 1165-66. "Frequently, the declarant's interest in furthering the conspiracy will be served by falsely incriminating the defendant or by exaggerating his role." Borisky, *supra*, at 1309. The First Circuit has acknowledged these realities:

> [T]he naming of another as a compatriot will almost never be against the declarant's own interest and thus will contain little assurance of reliability on this ground . . . . The

> invocation of a name may be gratuitous, may be deliberately false in order to gain advantages for the declarant greater than those that would flow from naming a real participant or no one at all, may be a cover for concealment purposes (another kind of 'advantage'), or may represent an effort to gain some kind of personal revenge.

United States v. Barrett, 539 F.2d 244, 252 (1st Cir. 1976) (citation omitted).

The exception "does not require that the out-of-court statement relate to the declarant's assigned role in the conspiracy or that the defendant be aware of who his cohorts were or what they were saying during the conspiracy," and "in a large or secretive conspiracy, the extrajudicial declarant may have had no knowledge of the defendant's role in the conspiracy," which creates the potential for "a declarant's statement, based on incomplete information, may mislead the trier of fact." *Id.* Consequently, even among the most dubious of the hearsay exceptions, "[t]he hearsay statements of alleged coconspirators are perhaps the most suspect of all." HSL O'Dougherty, *Prosecution And Defense Under Conspiracy Indictments*, 9 Brook. L. Rev. 263, 275 (1940). Not surprisingly then, during the pre-*Crawford* Era, when admissibility turned upon reliability, such statements often were excluded as unreliable. *See, e.g., United States v. Ordonez*, 737 F.2d 793, 802-04 (9th Cir. 1983); *United States v. Massa*, 740 F.2d 629, 639-40 (8th Cir. 1984); *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir. 1983).

D. At Common Law, Unsworn Co-Conspirator Statements Would Be Inadmissible Even If Not Testimonial

The Confrontation Clause should exclude all unsworn, out-of-court co-conspirator statements from an unavailable declarant, regardless of whether those statements are now characterized as testimonial or non-testimonial. There is no historical basis for the testimonial/non-testimonial dichotomy used in *Crawford* in this context, as those terms were never used to differentiate the kinds of hearsay at common law. Indeed, the word "testimonial" was not even used as an adjective during the Framing Era, but was merely used as a noun (*i.e.*, a "testimonial" formally certifying a person's character). Davies, 15 J. F. & Pol'y at 369-71 and

n.50 & 51. What the Supreme Court now characterizes as non-testimonial statements never would have been admissible at Founding because such statements were not under oath (unless a dying declaration, which was treated as tantamount to an oath). *Id.* at 391-92. Chief Justice Rehnquist was right in *Crawford* when he explained that the testimonial/non-testimonial distinction was "no better rooted in history than our current doctrine" because non-testimonial statements would never be admissible "because they were not made under oath." 541 U.S. at 69-72 (Rehnquist, C.J, concurring); *see also* Craig Bradley, *Melendez-Diaz And The Right Of Confrontation*, 85 Chi.-Kent L. Rev. 315, 319 (2010) (explaining the historical record supports Rehnquist's position); Robert Mosteller, *Giles v. California: Avoiding Serious Damage To Crawford's Limited Revolution*, 13 Lewis & Clark L. Rev. 675, 690-91 (2009) ("This recognition of the fundamental linkage of the hearsay rule of the framing era and the Confrontation Clause is, it seems to me, devastating theoretically to the idea that the Confrontation Clause was intended to cover only testimonial statements. There was no such concept in common law hearsay doctrine as a testimonial statement doctrine."). In effect then, the testimonial/non-testimonial distinction gets the Founding Era law essentially backward – "it would have been bizarre for the framers to restrict the use of out-of-trial statements that at least had the protections associated with the oath and a written record but leave the use of unsworn, unrecorded hearsay completely unrestricted." Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects Of Giles's Forfeiture Exception To Confrontation Were Or Were Not "Established At The Time Of The Founding"*, 13 Lewis & Clark L. Rev. 605, 664 (2009); Mosteller, 13 Lewis & Clark L. Rev. at 691 n.64 ("[T]he focus on testimonial statements gets the law at the time of the framing backward. Non-formal statements were even more clearly rejected than those which would be categorized as testimonial today.").

Thus, the only persons who could qualify as a "witness" for purposes of the Confrontation Clause at the time of the Framing were persons with first-hand knowledge. Davies, 15 J. F. & Pol'y at 381.[12] Neither the Supreme Court nor any scholar has yet identified any pre-Framing situation where non-testimonial hearsay was admitted in criminal proceedings against a defendant under the co-conspirator statement exception. *Id.* at 377. Even the most ardent supporter of this testimonial/non-testimonial distinction, Justice Scalia, "has yet to identify a historical record case that admitted unsworn 'nontestimonial' hearsay statements of an unavailable declarant." Davies, 13 Lewis & Clark L. Rev. at 611. We doubt the government can do better by finding any citation to support its position.

The Supreme Court has not been briefed on the history of the co-conspirator hearsay exception or decided the contours of the doctrine as it existed (or did not exist) in the Founding Era. The Supreme Court had addressed the forfeiture by wrongdoing exception in *dicta* in *Crawford*, but refined its understanding of that doctrine in the context of *Giles* once it was presented with the full historical record of that exception. *Crawford*, 541 U.S. at 43-44. This Court should find that the co-conspirator hearsay exception did not exist when the Confrontation Clause was adopted and, therefore, cannot be used to overcome the bar of the Clause.

CONCLUSION

Because the co-conspirator hearsay exception would not have permitted the statements the government seeks to introduce in this case at common law, the Court should hold those

[12] *Crawford* cites 2 Noah Webster, *An American Dictionary of the English Language* (1828), in defining "witness" as someone who "bears testimony." 541 U.S. at 51. But the same dictionary also defines "witness" more broadly and in a non-testimonial sense as "A person who knows or sees any thing; one personally present; as he was witness, he was an eye-witness." Both definitions reflect "common usage" and "there is no reason, based on the text, to eliminate either category from the Confrontation Clause's scope." Bellin, *supra*, at 1886; *see* Fisher, *supra*, at 19; Randolph Jonkait, *"Witnesses" In the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 Temp. L. Rev. 155, 159 (2006).

statements inadmissible pursuant to the Confrontation Clause. Without this evidence, the government has not case, and the Indictment should be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 26, 2019, a copy of the foregoing was filed with the Court's electronic case filing system, thereby effecting service on counsel for all parties.

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